Supreme Court, U.S.
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No. 01-011617

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In The

Supreme Court of the United States

EARL ATWOOD, in his official capacity as Director, Wyoming Department of Revenue, and SLEETER DOVER, in his official capacity as Director of the Wyoming Department of Transportation,

Petitioners,

vs.

BURLINGTON NORTHERN and SANTA FE RAILWAY COMPANY, UNION PACIFIC RAILROAD COMPANY, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the abrogation of Eleventh Amendment immunity in the Railroad Revitalization and Regulatory Reform Act a valid exercise of Congressional power to enforce the Fourteenth Amendment?

THE PARTIES

Petitioners are the Director of the Wyoming Department of Revenue and the Director of the Wyoming Department of Transportation.

At the time that these suits were initiated, the Director of the Wyoming Department of Revenue was R.M. "Johnnie" Burton. After the U.S. Court of Appeals for the Tenth Circuit issued its decision, Earl Atwood was appointed to succeed R.M. "Johnnie" Burton as Director of the Wyoming Department of Revenue. Accordingly, Mr. Atwood was automatically substituted for the previous Director of the Wyoming Department of Revenue, Ms. Burton, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. Joint Motion For Stay and Consent Injunction filed in the U.S. District Court for the District of Wyoming on April 3, 2002, at p. 2 n. 1. Accordingly, Mr. Atwood is automatically substituted for Ms. Burton in this Court. Rule 35.3 of the Rules of the Supreme Court of the United States.

At all times during the pendency of these cases, the Director of the Wyoming Department of Transportation has been and is Sleeter Dover.

Respondents are Plaintiffs Burlington Northern and Santa Fe Railway Company, Union Pacific Railroad Company, and Intervenor United States of America.

STATEMENT PURSUANT TO RULE 29.6

Petitioners have been sued in their official capacity and are therefore government entities, and pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, no corporate disclosure statement is required.

TABLE OF CONTENTS

Page

Question Presented i

The Parties ii

Statement Pursuant to Rule 29.6 iii

Table of Contents iv

Table of Authorities vi

Opinions Below 1

Statement of Jurisdiction 1

Constitution and Statutes Involved 1

Statement of the Case 2

Reasons for Granting the Writ 3

I. This Case Raises a Recurring Issue of Nationwide Importance 3

II. The Tenth Circuit's Holding is Inconsistent with the Decisions of this Court and Other Circuit Courts 6

III. There is a Disagreement among Courts as to Whether the Abrogation of Eleventh Amendment Immunity in the Railroad Revitalization and Regulatory Reform Act is a Valid Exercise of Congressional Power to Enforce the Fourteenth Amendment 16

Conclusion 19

TABLE OF CONTENTS – Continued

Page

Appendix.....App. 1

Decision of the U.S. Court of Appeals for the Tenth Circuit.....App. 1

Order of the U.S. District Court for the District of Wyoming.....App. 11

Order of the U.S. Court of Appeals for the Tenth Circuit.....App. 38

United States Constitution.....App. 40

United States Code.....App. 41

Wyoming Statutes.....App. 46

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT

Bell's Gap R. Co. v. Commonwealth of Pennsylvania, 134 U.S. 232 (1890) 8

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 13, 15

Burlington Northern Railroad Co. v. Oklahoma Tax Commission, 481 U.S. 454 (1987) 18

California State Board of Equalization v. Atchison, Topeka & Santa Fe Railway Co., 528 U.S. 1114 (2000) 5

California State Board of Equalization v. Southern Pacific Transportation Co., 528 U.S. 1114 (2000) 5

Cincinnati, N.O. & T.P.R. Co. v. Kentucky, 115 U.S. 321 (1885) 7

City of Boerne v. Flores, 521 U.S. 507 (1997) 4, 10

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) 13

Ft. Smith Light & Traction Co. v. Board of Improvement of Paving Dist., 274 U.S. 387 (1927) 7

Gregory v. Ashcroft, 501 U.S. 452 (1991) 18

Katzenbach v. Morgan, 384 U.S. 641 (1966) 17

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000) 6, 9, 13, 16

Nashville, Chattanooga & St. Louis Railway v. Browning, 310 U.S. 362 (1940) 4, 8, 9, 15

New York & N.E.R. Co. v. Bristol, 151 U.S. 56 (1894) 8

TABLE OF AUTHORITIES – Continued

Page

New York Rapid Transit Corp. v. City of New York, 303 U.S. 573 (1938) 8

Ohio Tax Cases, 232 U.S. 576 (1914) 8

Pennhurst State School v. Halderman, 451 U.S. 1 (1981) 18

West Virginia Board of Public Works v. CSX Transportation, Inc., 525 U.S. 821 (1998) 5

Wheeling & Lake Erie Railway Company v. Pennsylvania Public Utility Comm'n, 528 U.S. 928 (1999) 5, 17, 18

UNITED STATES COURT OF APPEALS

Burlington Northern and Santa Fe Ry. Co. v. Burton, 270 F.3d 942 (10th Cir. 2001) 4

CSX Transportation, Inc. v. New York State Office of Real Property Services et alia, (2nd Cir.) (Docket No. 01-7966) (decision pending) 5

CSX Transportation, Inc. v. Board of Public Works, 138 F.3d 537 (4th Cir. 1998), *cert. denied*, 525 U.S. 821 (1998) 4

Chavez v. Arte Public Press, 157 F.3d 282 (5th Cir. 1998) 13

Chittister v. Department of Community and Economic Development, 226 F.3d 223 (3rd Cir. 2000) 13

Erickson v. Board of Governors, 207 F.3d 945 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001) 11

Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000) 11

Laro v. New Hampshire, 259 F.3d 1 (1st Cir. 2001) 13

TABLE OF AUTHORITIES – Continued

Page

Lavia v. Pennsylvania Dep't of Corr., 224 F.3d 190 (3rd Cir. 2000) 11

McGinty v. New York, 251 F.3d 84 (2nd Cir. 2001) 11

Oregon Short Line Railroad Co. v. Department of Revenue Oregon, 139 F.3d 1259 (9th Cir. 1998)....5, 17

Popovich v. Cuyahoga County Court of Common Pleas, 227 F.3d 627 (6th Cir. 2000) 11

Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001) 11

Sims v. University of Cincinnati, 219 F.3d 559 (6th Cir. 2000) 11

Stevens v. Illinois Dep't of Transp., 210 F.3d 732 (7th Cir. 2000) 11

Union Pacific Railroad Co. v. Utah, 198 F.3d 1201 (10th Cir. 1999) 3, 5

Wheeling and Lake Erie R. Co. v. Public Utility Comm'n of the Commonwealth of Pennsylvania, 141 F.3d 88 (3rd Cir. 1998), *cert. denied*, 528 U.S. 928 (1999) 5

Wilson-Jones v. Caviness, 99 F.3d 203 (6th Cir. 1996), *modified on other grounds*, 107 F.3d 358 (6th Cir. 1997) (per curiam) 13

UNITED STATES DISTRICT COURTS

CSX Transp., Inc. v. Board of Public Works, 997 F.Supp. 749 (S.D.W.Va. 1997), *rev'd on other grounds*, 138 F.3d 537 (4th Cir. 1998), *cert. denied*, 525 U.S. 821 (1998) 5, 17

CSX Transp., Inc. v. New York State Office of Real Property Services, 150 F.Supp.2d 605 (S.D.N.Y. 2001), *appeal pending*, Docket No. 01-7966 (2nd Cir.) 5

TABLE OF AUTHORITIES – Continued

Page

Fox River Valley R.R. Corp. v. Department of Revenue of State of Wisconsin, 863 F.Supp. 893 (E.D.Wis. 1994) 6

Southern Pennsylvania Transp. Authority v. Pennsylvania Public Utility Com'n, 802 F.Supp. 1273 (E.D.Pa. 1992) 6

Union Pacific R. Co. v. Burton, 949 F.Supp. 1546 (D.Wyo. 1996) 6, 17, 18

Union Pacific R.R. Co. v. Utah, 996 F.Supp. 1358 (D. Utah 1997), *rev'd*, 198 F.3d 1201 (10th Cir. 1999) 5, 17, 18

UNITED STATES CONSTITUTION

U.S. CONST. Amend XI 4, 6, 14

U.S. CONST. Amend XIV ..... *passim*

U.S. CONST. Art. I, § 8 ..... 1, 12

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. § 621 6

29 U.S.C. § 2601 13

42 U.S.C. § 12111 15

49 U.S.C. § 10101 ..... 2, 12, 18

49 U.S.C. § 11501 ..... 2, 3, 4

49 U.S.C. § 11501(b) 10, 12

49 U.S.C. § 11501(b)(4) 16

49 U.S.C. § 11501(c) 15

TABLE OF AUTHORITIES – Continued

Page

WYOMING STATUTES

W.S. § 39-20-101 ..... 2, 3

W.S. § 39-20-111 3

W.S. § 39-21-101 ..... 2, 3

W.S. § 39-21-101(a)(ii) 3

W.S. § 39-21-104(b) 3

RULES

Rule 12(b) of the Federal Rules of Civil Procedure 2

Rule 25(d) of the Federal Rules of Civil Procedure ii

Rule 29.6 of the Rules of the Supreme Court of the United States iii

Rule 35.3 of the Rules of the Supreme Court of the United States ii

MISCELLANEOUS AUTHORITIES

Common and Contract Carrier State Property Tax Discrimination: Hearing Before the Subcomm. on Transportation and Aeronautics of the Comm. on Interstate and Foreign Commerce, House of Representatives 91st Cong. 5 (1970) 9

Federal Railroad Administration, U.S. Department of Transportation, *Report On Policy and Program Development*, http://www.fra.dot.gov/policy/freight4.htm 4

H.R. Doc. No. 89-30 (1966) 9

S. Rep. No. 91-630 (1969) 4, 8, 10, 11, 12

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Order Denying Defendants' Motions to Dismiss entered by the United States District Court for the District of Wyoming is unreported and is included in the Appendix to the Petition.

The order and judgment entered by the United States Court of Appeals for the Tenth Circuit is reported at 270 F.3d 942 (10th Cir. 2001) and is included in the Appendix to this Petition.

The order of the United States Court of Appeals for the Tenth Circuit denying Petitioners' petition for rehearing is unreported and is included in the Appendix to this Petition.

STATEMENT OF JURISDICTION

The order and judgment of the Court of Appeals was entered on October 24, 2001. The date of the order of the Court of Appeals denying Petitioners' motion for rehearing is January 31, 2002. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTES INVOLVED

This petition involves the Commerce Clause of Section 8 of Article I, the Eleventh Amendment, and Sections 1 and 5 of the Fourteenth Amendment to the United

States Constitution. It also involves the Railroad Revitalization and Regulatory Reform Act (4-R Act), 49 U.S.C. §§ 10101, 11501. Finally, it involves the Wyoming Statutes on the Coal Transportation Tax and the Tax on Railroads. W.S. § 39-21-101 *et seq.*; W.S. § 39-20-101 *et seq.* Copies of each of these Constitutional provisions and statutes are supplied in the Appendix to this Petition.

STATEMENT OF THE CASE

The Railroad Revitalization and Regulatory Reform Act (4-R Act) creates a legal cause of action against States that discriminate against railroads in taxation. The Fourteenth Amendment does not prohibit States from discriminating against railroads in taxation. Nonetheless, the United States Court of Appeals held that the Fourteenth Amendment renders constitutional the 4-R Act's abrogation of the sovereign immunity guaranteed to the States by the Eleventh Amendment to the United States Constitution.

In 2000, Wyoming enacted a coal transportation tax (W.S. § 39-21-101 *et seq.*) and a tax on railroads (W.S. § 39-20-101 *et seq.*). Respondents sued Petitioners arguing that the coal transportation tax and the railroad tax violated the Railroad Revitalization and Regulatory Reform Act. 49 U.S.C. § 11501. Petitioners moved to dismiss for lack of jurisdiction under Rule 12(b) of the Federal Rules of Civil Procedure. The District Court denied Petitioners' motions. Petitioners appealed to the United States Court of Appeals for the Tenth Circuit, which affirmed without oral argument based upon the circuit law. 270 F.3d 942

(10th Cir. 2001), citing *Union Pacific Railroad Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999). Petitioners filed a petition for rehearing. Without hearing any argument, the Court of Appeals denied Petitioners' petition.

REASONS FOR GRANTING THE WRIT

I. This Case Raises a Recurring Issue of Nationwide Importance

This case concerns the constitutionality of the abrogation of the Eleventh Amendment by the Railroad Revitalization and Regulatory Reform Act (4-R Act), which prohibits States from discriminating against railroads in taxation. 49 U.S.C. § 11501. The litigation arises from challenges by railroads of two taxes Wyoming adopted in 2000: the coal transportation tax and the tax on railroads. W.S. § 39-21-101 *et seq.*; W.S. § 39-20-101 *et seq.*

The coal transportation tax applies to the commercial transportation of coal regardless of whether that transportation is by railroad, by truck or by trailer. W.S. §§ 39-21-101(a)(ii), 39-21-104(b). The revenues raised by the railroad tax are statutorily dedicated to railroad grade separation facilities. W.S. § 39-20-111.

This case therefore affects the ability of every State in the Nation to require railroads to pay their fair share of taxes, including the share necessary to protect the public from safety hazards railroads create. States have been deterred from enacting such taxes by the mere threat of litigation under the 4-R Act, even when such taxes do not discriminate against railroads and even when such taxes are imposed against railroads in an entirely constitutional

manner. Moreover, the railroad industry is one that holds and receives tens of billions of dollars in property and annual income. Federal Railroad Administration, U.S. Department of Transportation, Report On Policy and Program Development at http://www.fra.dot.gov/policy/freight4.htm.

The 4-R Act prohibits States from discriminating against railroads in taxation. 49 U.S.C. § 11501. The Fourteenth Amendment does not. *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362, 368-369 (1940). In fact, Congress enacted the 4-R Act for the very purpose of prohibiting practices permitted by the Fourteenth Amendment. S. Rep. 91-630, at 7 (1969).

Nonetheless, the Tenth Circuit has ruled that the 4-R Act enforces the Fourteenth Amendment and that the 4-R Act's abrogation of the Eleventh Amendment is therefore constitutional. *Burlington Northern and Santa Fe Ry. Co. v. Burton*, 270 F.3d 942 (10th Cir. 2001). In stark contrast, the Court has held that the Fourteenth Amendment does not confer upon Congress the power to change the Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

The Fourth Circuit has stated that the question of whether the Fourteenth Amendment renders the 4-R Act's abrogation of the Eleventh Amendment constitutional is therefore at a minimum "a controversial issue, which in some appropriate future case will need to be resolved." *CSX Transportation, Inc. v. Board of Public Works*, 138 F.3d 537, 543, n. 4 (4th Cir. 1998), *cert. denied*, 525 U.S. 821 (1998).

That the question of the constitutionality of the 4-R Act's abrogation is recurring is well evidenced by the

numerous previous certiorari petitions relating to the issue. *California State Board of Equalization v. Southern Pacific Transportation Co.*, 528 U.S. 1114 (2000); *California State Board of Equalization v. Atchison, Topeka & Santa Fe Railway Co.*, 528 U.S. 1114 (2000); *Wheeling & Lake Erie Railway Company v. Pennsylvania Public Utility Comm'n*, 528 U.S. 928 (1999); *West Virginia Board of Public Works v. CSX Transportation, Inc.*, 525 U.S. 821 (1998).

The recurring nature of the issue and its importance to the States is also demonstrated by the fact that at least five circuit courts have been asked to rule on the issue on at least six occasions. *CSX Transportation, Inc. v. New York State Office of Real Property Services et alia*, (2nd Cir.) (Docket No. 01-7966) (argued April 29, 2002) (decision pending); *Burton*, 270 F.3d 942 (10th Cir. 2001); *Union Pacific Railroad Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999); *Wheeling & Lake Erie R. Co. v. Public Utility Comm'n of the Commonwealth of Pennsylvania*, 141 F.3d 88 (3rd Cir. 1998), *cert. denied*, 528 U.S. 928 (1999); *Oregon Short Line Railroad Co. v. Department of Revenue Oregon*, 139 F.3d 1259 (9th Cir. 1998); *CSX Transportation, Inc. v. West Virginia Board of Public Works*, 138 F.3d 537 (4th Cir.), *cert. denied*, 525 U.S. 821 (1998).

Similarly, at least six different district courts have been asked to rule on the matter on at least six different occasions. *CSX Transp., Inc. v. New York State Office of Real Property Services et alia*, 150 F.Supp.2d 605 (S.D.N.Y. 2001), *appeal pending*, Docket No. 01-7966 (2nd Cir.); *CSX Transp., Inc. v. Board of Public Works*, 997 F.Supp. 749 (S.D.W.Va. 1997), *rev'd on other grounds*, 138 F.3d 537 (4th Cir. 1998), *cert. denied*, 525 U.S. 821 (1998); *Union Pacific R.R. Co. v. Utah*, 996 F.Supp. 1358 (D. Utah 1997), *rev'd*,

198 F.3d 1201 (10th Cir. 1999); *Union Pacific R. Co. v. Burton*, 949 F.Supp. 1546 (D.Wyo. 1996); *Fox River Valley R.R. Corp. v. Department of Revenue of State of Wisconsin*, 863 F.Supp. 893 (E.D.Wis. 1994); *Southern Pennsylvania Transp. Authority v. Pennsylvania Public Utility Com'n*, 802 F.Supp. 1273 (E.D.Pa. 1992).

The constitutional question of whether the Fourteenth Amendment empowers Congress to abrogate the Eleventh Amendment to prohibit discrimination permitted by the Fourteenth Amendment, and to do so solely in the exercise of its powers to enforce the Fourteenth Amendment, is one that affects every piece of Congressional legislation prohibiting discrimination permitted by the Constitution. It is therefore a recurring question that will precipitate numerous certiorari petitions until answered by the Court.

II. The Tenth Circuit's Holding is Inconsistent with the Decisions of this Court and Other Circuit Courts

This case is remarkably similar to this Court's recent decision in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). In *Kimel*, the Court held that the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 *et seq.*) was not a valid exercise of Congress' power to abrogate State sovereign immunity to enforce the Fourteenth Amendment, because it attempted to substantively redefine the States' legal obligations under the Fourteenth Amendment with respect to age discrimination. 528 U.S. at 82-92. The Court reached this conclusion because: (1) the legislative history did not evidence a

pattern of discrimination by the States that violated the Fourteenth Amendment, and (2) the ADEA prohibited substantially more practices than would likely be held unconstitutional under the Fourteenth Amendment. *Id.* The 4-R Act's history does not evidence that States were violating the Fourteenth Amendment in their discrimination against railroads. Further, the 4-R Act prohibits substantially more practices than would likely be held unconstitutional under the Fourteenth Amendment. Thus, the 4-R Act is no more a valid exercise of Congress' power to abrogate sovereign immunity to enforce the Fourteenth Amendment than the ADEA was.

A. *The History of Unconstitutional Activity by States Factor*

The legislative history of the 4-R Act may evidence a pattern of States discriminating against railroads, but it does not evidence a pattern of States doing so in a way that violates the Fourteenth Amendment. To the contrary, in fact, the legislative history establishes that the purpose of the 4-R Act was to prohibit State discrimination against railroads for the very reason that the Fourteenth Amendment does not.

By the time the 4-R Act was being considered, the Court had ruled that the Fourteenth Amendment's Equal Protection Clause does not require States to treat different classes differently where those differences may be made the rational basis of legislative discrimination. *Ft. Smith Light & Traction Co. v. Board of Imp. of Paving Dist.*, 274 U.S. 387, 391 (1927); *Cincinnati, N.O. & T.P.R. Co. v. Kentucky*, 115 U.S. 321, 337 (1885). The Court had even

applied that principle to taxation. *Bell's Gap R. Co. v. Com. of Pennsylvania,* 134 U.S. 232, 237 (1890).

In fact, the Court had already held that so far as the Federal Constitution is concerned, a State can put railroads "into one pigeonhole" and other classes into another for purposes of imposing different tax rates. *Nashville,* 310 U.S. at 368-369; *accord, New York Rapid Transit Corp. v. City of New York,* 303 U.S. 573, 578-587 (1938); *Ohio Tax Cases,* 232 U.S. 576 (1914); *New York & N.E.R. Co. v. Bristol,* 151 U.S. 556 (1894).

Indeed, the legislative history of the 4-R Act notes that State treatment of railroad property as a separate class does not violate the Fourteenth Amendment, remarking that court decisions:

> do not reach the situation in which State or local authorities levy discriminatory assessments or tax rates against common carriers, where the express provisions of State law or a State constitution permit such discriminatory treatment. This is most often accomplished by classifying carrier property in a separate class from other taxable property in the same district, a practice which the Supreme Court allowed in *Nashville, Chattanooga & St. L. Ry. v. Browning,* 310 U.S. 362 (1940), against a claim that such classification is violative of the "equal protection" clause of the 14th amendment.

S. Rep. 91-630, at 7.

Accordingly, Professor Paul Sanders, who appeared before Congress on behalf of the Association of American Railroads and several railroads, supported the need for the 4-R Act specifically on the grounds that "the case of

Nashville, Chattanooga & St. Louis Railway v. Browning, decided in 1940, stated that a separate mode of assessment of railroad property at a higher percentage of value did not violate the equal protection clause of the 14th Amendment." H.R. Doc. No. 89-30, at 10, 47, 49 (1966).

Similarly, the Chairman of the Interstate Commerce Commission noted, in hearings regarding the 4-R Act, that State and local governments could treat railroads differently from other classes of taxpayers under the Supreme Court's *Nashville* decision. *Common and Contract Carrier State Property Tax Discrimination: Hearing Before the Subcomm. on Transportation and Aeronautics of the Comm. on Interstate and Foreign Commerce, House of Representatives*, 91st Cong. 5 (1970) (statement of George M. Stafford, Chairman, Interstate Commerce Commission).

A statute whose legislative history does not evidence a pattern of activity by States prohibited by the Fourteenth Amendment and which prohibits substantially more practices than the Fourteenth Amendment is not a valid exercise of Congress' power to abrogate State sovereign immunity in order to enforce the Fourteenth Amendment. *Kimel*, 528 U.S. 62 (2000). While the Tenth Circuit in the case at bar intimated that Congress found that discriminatory taxation of railroads *might* have violated the "rational basis requirement of the Equal Protection Clause," that court did not identify a single excerpt of the legislative history specifically finding that such taxation violated the Equal Protection Clause or lacked a rational basis. *Burton*, 198 F.3d at 1206. Contrary to the intimation of the Tenth Circuit, Congress acknowledged that the Court had expressly ruled that treating railroads differently than others did not violate the Equal Protection

Clause. S. Rep. 91-630, at 7. Indeed, the 4-R Act's legislative history establishes that it was the very constitutionality of such practices, rather than their unconstitutionality, that prompted the 4-R Act's passage.

The power conferred by Section 5 to enforce the Fourteenth Amendment is not unlimited. *City of Boerne v. Flores*, 521 U.S. 507, 518-519 (1997). In particular, it does not include the power to decree the substance of that Amendment's restrictions on the States. *Id.* at 519. Legislation that alters the meaning of a constitutional provision cannot be said to be enforcing that provision. *Id.* "Congress does not enforce a constitutional right by changing what the right is." *Id.* If Congress were given the power to determine what constitutes a Constitutional violation under the guise of enforcing the Constitution, what Congress would be enforcing would no longer be, in any meaningful sense, the Constitution. *Id.* The 4-R Act was a declaration by Congress that certain activities by States violated the Equal Protection Clause, where the Supreme Court had held that those activities did not. The 4-R Act was therefore intended to redefine, rather than merely enforce, the Equal Protection Clause.

Congress made it clear that the 4-R Act was intended to change what the Equal Protection Clause of the Fourteenth Amendment requires. The text of the Act itself declares: "the following . . . discriminate . . . and a State may not do any of them." 49 U.S.C. § 11501(b). Moreover, Congress justified the legislation on the grounds that the Interstate Commerce Act had already set a precedent for the 4-R Act by providing that certain activity by States was "hereby *declared* to constitute an unreasonable and unjust discrimination . . . and is hereby forbidden and

declared to be unlawful." S. Rep. 91-630 at 9, citing Section 13(4) of the Interstate Commerce Act (emphasis supplied).

The Tenth Circuit ruled that the Fourteenth Amendment rendered the 4-R Act's abrogation constitutional in part because the 4-R Act employs a term (discrimination) that is also used in Fourteenth Amendment equal protection analysis. However, what Congress determines constitutes "discrimination" is not necessarily the same as what is discrimination in the constitutional sense. *Reickenbacker v. Foster*, 274 F.3d 974, 981 (5th Cir. 2001); *Popovich v. Cuyahoga County Court of Common Pleas*, 227 F.3d 627, 640-642 (6th Cir. 2000); *Erickson v. Board of Governors*, 207 F.3d 945, 951-952 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001).

Unlike the Tenth Circuit, the Second, Third, Fifth, Sixth and Seventh Circuits have held that legislation which prohibits discrimination against a non-suspect class, regardless of whether such discrimination has a rational basis and serves a legitimate government interest, is not a valid abrogation. *McGinty v. New York*, 251 F.3d 84, 91-92 (2nd Cir. 2001); *Popovich*, 227 F.3d at 637-642 (6th Cir. 2000); *Kazmier v. Widmann*, 225 F.3d 519, 524-529 (5th Cir. 2000); *Lavia v. Pennsylvania Dep't of Corr.*, 224 F.3d 190, 204-206 (3rd Cir. 2000); *Sims v. University of Cincinnati*, 219 F.3d 559, 565-566 (6th Cir. 2000); *Stevens v. Illinois Dep't of Transp.*, 210 F.3d 732, 737-741 (7th Cir. 2000); *Erickson*, 207 F.3d at 951-952 (7th Cir. 2000).

The 4-R Act emerged from the Committee on Commerce to amend the Interstate Commerce Act. The purposes of the 4-R Act set forth in statute were aimed at

furthering commerce. 49 U.S.C. § 10101. In passing the 4-R Act, Congress "invoke[d] the power of the Congress under the commerce clause of the Constitution, Article I, section 8, to promote, foster and protect interstate commerce by relieving and removing burdens thereupon." S. Rep. 91-630, at 9-10 (1969). In fact, the legislative history specifically noted that "the constitutional power of Congress to legislate in this area is clearly appropriate under the commerce clause." S. Rep. 91-630, at 23. The heart of the Act itself is a statement that "the following acts unreasonably burden . . . interstate commerce, and a State . . . may not do any of them." 49 U.S.C. § 11501(b).

The 4-R Act's legislative history establishes that Congress intended to prohibit discriminatory taxation of railroads because it burdened interstate commerce, not because it violated the Fourteenth Amendment. The legislation, Congress explained,

> "invokes the power of the Congress under the commerce clause of the Constitution, Article I, section 8, to promote, foster and protect interstate commerce by relieving and removing burdens thereupon. *Discriminatory State and local taxation practices impede interstate commerce* by weakening the common carrier system which is the instrumentality for the movement of that commerce."

S. Rep. 91-630, at 9-10 (emphasis supplied).

Congress was therefore very explicit that it was passing the 4-R Act pursuant to the Commerce Clause. Congress' Commerce Clause powers do not include the power to abrogate the Eleventh Amendment. *Board of*

Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 364 (2001); *Kimel*, 528 U.S. at 78-80.

Where Congress has been so explicit about invoking its authority under a specific provision of the Constitution, courts do not entertain alternative bases for legislation. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 642, n. 7 (1999). Thus, the Third Circuit declined to consider the due process clause as an alternative basis for the Family Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.*, in determining that that Act's abrogation was unconstitutional. *Chittister v. Department of Community and Economic Development*, 226 F.3d 223, 228 n. 3 (3rd Cir. 2000).

Similarly, the First Circuit has rejected the constitutionality of abrogation legislation even though Congress might have found that States had actually been violating the Fourteenth Amendment, because Congress did not in fact find that States had been doing so. *Laro v. New Hampshire*, 259 F.3d 1, 16 (1st Cir. 2001). Likewise, the Fifth Circuit has ruled that it might be "too much of a leap" to infer Congress' reliance on the Fourteenth Amendment in legislation when Congress did not expressly state its intent to legislate on that basis. *Chavez v. Arte Public Press*, 157 F.3d 282, 287 n. 8 (5th Cir. 1998). Similarly, the Sixth Circuit has noted that "in the absence of explicit comment by Congress, only efforts to remedy discrimination against a class of persons that Fourteenth Amendment jurisprudence has already identified as deserving special protection" is properly viewed as legislation passed pursuant to Section 5 of the Fourteenth Amendment. *Wilson-Jones v. Caviness*, 99 F.3d 203, 210 (6th

Cir. 1996), *modified on other grounds*, 107 F.3d 358 (6th Cir. 1997) (per curiam).

In stark contrast, the Tenth Circuit in this case ruled that the "conclusion that the 4-R Act was a valid exercise of Congress' power to enforce the Equal Protection Clause is not, therefore, called into question by Congress' failure to rely expressly on the Fourteenth Amendment." *Burton*, 270 F.3d at 946, citing *Utah*, 198 F.3d at 1208.

It is one thing to rule that legislation can be a valid exercise of Congress' power to enforce the Fourteenth Amendment without expressly relying on Section 5 of the Fourteenth Amendment. *Burton*, 270 F.3d at 946; *accord*, *Utah*, 198 F.3d at 1208-1209. It is altogether another thing to hold that legislation can be a valid exercise of Congress' power to enforce the Fourteenth Amendment when the legislative history clearly establishes that Congress exercised its powers to enact the legislation under the Commerce Clause, and did so to circumvent the fact that activities the legislation was designed to prohibit were constitutional under the Fourteenth Amendment.

In sum, the legislative history indicates that the 4-R Act was passed to prevent discrimination against railroads pursuant to the Commerce Clause, not to prevent violations of the Fourteenth Amendment's Equal Protection Clause. As the Tenth Circuit itself recognized in the case at bar, the law is now clear that Congressional abrogation under the Commerce Clause violates the Eleventh Amendment. 270 F.3d at 946.

B. *The Substantially More Practices Factor*

The Tenth Circuit dismissed Petitioners' claim that the 4-R Act prohibits "substantially more practices" than the Equal Protection Clause of the Fourteenth Amendment on the basis that the 4-R Act only prohibits discrimination against railroads in taxation to the extent that the discrimination rises above 5%. 270 F.3d at 946-947, citing 49 U.S.C. § 11501(c). However, the Fourteenth Amendment does not prohibit discrimination in taxation against a non-suspect class (like railroads) that exceeds 5% where such discrimination has a rational basis and serves a legitimate government interest. *See* Part II.A, *ante* at 7-10. The 4-R Act's abrogation of Eleventh Amendment immunity therefore constitutes a rewriting of the Fourteenth Amendment law on taxation of railroads, just as the abrogation in the Americans with Disability Act (ADA), 42 U.S.C. § 12111 *et seq.*, would rewrite the Fourteenth Amendment law on disability. *Garrett*, 531 U.S. at 370-374.

The 5% threshold does not save the 4-R Act from unconstitutionality. A 5% threshold still prohibits a great deal more conduct than that prohibited by the Fourteenth Amendment – since the Fourteenth Amendment does not prohibit discrimination in taxing railroads in the first place. *Nashville*, 310 U.S. at 368-369. A tax that discriminates against a non-suspect class of taxpayers does not violate the equal protection clause as long as the discrimination has a rational basis and serves a legitimate government interest. *See* Part II.A, *ante* at 7-10. Moreover, the 4-R Act's 5% threshold does not apply to every category of taxes that the 4-R Act prohibits. *See, e.g.*, 49 U.S.C.

§ 11501(b)(4). For all these reasons, the 5% threshold in the 4-R Act is not a proper basis for dismissing a claim that a statute does prohibit "substantially more practices" than the Equal Protection Clause of the Fourteenth Amendment.

This Court concluded in *Kimel* that the ADEA prohibited substantially more practices than the Fourteenth Amendment because the Fourteenth Amendment does not prohibit age discrimination so long as it is rationally related to a legitimate state interest, while the ADEA does. *Kimel*, 528 U.S. at 82-88. The Fourteenth Amendment does not prohibit States from treating railroads differently than other classes of taxpayers, while the 4-R Act does. The 4-R Act therefore prohibits substantially more practices than the Fourteenth Amendment, just as the ADEA does.

The Tenth Circuit's decision that the 4-R Act does not prohibit "substantially more practices" than the Fourteenth Amendment is inconsistent with the long and well established U.S. Supreme Court precedent to the contrary.

III. There is a Disagreement among Courts as to Whether the Abrogation of the Eleventh Amendment in the Railroad Revitalization and Regulatory Reform Act Is a Valid Exercise of Congressional Power to Enforce the Fourteenth Amendment

In the case at bar, the Tenth Circuit has held that the 4-R Act's abrogation of Eleventh Amendment immunity is a constitutional exercise of Congress's powers under Section Five of the Fourteenth Amendment. *Burton*, 270

F.3d 942 at 945-947. The Third and Ninth Circuits have concurred with this conclusion. *Wheeling & Lake Erie R. Co. v. Public Utility Comm'n of the Commonwealth of Pennsylvania*, 141 F.3d 88 (3rd Cir. 1998), *cert. denied*, 528 U.S. 928 (1999); *Oregon Short Line Railroad Co. v. Department of Revenue Oregon*, 139 F.3d 1259 (9th Cir. 1998).

However, a good number of judges and courts have reached the opposite conclusion. Thus, Judge Garth of the Third Circuit concluded that the 4-R Act's abrogation of Eleventh Amendment was unconstitutional. *Wheeling & Lake Erie R. Co.*, 141 F.3d at 97-101 (Garth, J., dissenting). Three different federal district courts have reached the very same conclusion. *CSX Transp., Inc. v. Board of Public Works of State of West Virginia*, 997 F.Supp. 749, 750-752 (S.D.W.Va. 1997), *rev'd on other grounds*, 138 F.3d 537 (4th Cir. 1998), *cert. denied*, 525 U.S. 821 (1998); *Union Pacific R.R. Co. v. Utah*, 996 F.Supp. 1358, 1360-1362 (D.Utah 1997), *rev'd*, 198 F.3d 1201 (10th Cir. 1999); *Union Pacific R. Co. v. Burton, Director, Wyoming Department of Revenue*, 949 F.Supp. 1546, 1550-1554 (D.Wyo. 1996).

Judge Garth observed that not only was the major purpose of the 4-R Act to protect interstate commerce, but also that "[n]owhere in the 4-R Act can a Congressional expression be found that the 4-R Act was passed to secure the rights under the Fourteenth Amendment." *Wheeling & Lake Erie R. Co.*, 141 F.3d at 99, citing *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966). He noted the absence of "any evidence that could support the conclusion that the disparate taxation to which railroads were subjected constituted a violation under the Equal Protection Clause." 141 F.3d at 100. The judge reasoned that

what the 4-R Act does is prohibit long-standing constitutionally permissible discriminatory taxation practices. 141 F.3d at 100.

When the District Court for the District of Wyoming examined each of the fifteen provisions of the 4-R Act setting forth its legislative purpose, the court concluded that those purposes were aimed at furthering commerce. *Union Pacific R. Co.*, 949 F.Supp. at 1554, citing 49 U.S.C. § 10101. The court noted that it "cannot find that there is any evidence by way of a factual predicate to support a finding that the 4-R Act was enacted to further anti-discriminatory or equal protection claims." 949 F.Supp. at 1554. Accordingly, the court found that the purpose of the 4-R Act was to further commerce, not to further the objectives of the Fourteenth Amendment. 949 F.Supp. at 1553-1554, quoting *Burlington Northern Railroad Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 457 (1987).

The District Court for the District of Utah observed that Congress did not cite Section 5 of the Fourteenth Amendment as authority for enacting the 4-R Act. *Union Pacific R.R. Co.*, 996 F.Supp. at 1361, *rev'd*, 198 F.3d 1201 (10th Cir. 1999). The court noted that a court must not " 'quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.' " 996 F.Supp. at 1361-1362, quoting *Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) (quoting *Pennhurst State School v. Halderman*, 451 U.S. 1, 16 (1981)). The court therefore ruled that there is not a sufficiently strong connection between protection of railroads and recognized Fourteenth Amendment goals to permit a conclusion that the 4-R Act is legislation passed to enforce the Fourteenth Amendment, "particularly . . . in view of the

clear intent of Congress to pass the 4-R Act to relieve burdens placed on interstate commerce by discriminatory taxation of railroads." *Id.*

CONCLUSION

For all the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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April 30, 2002

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY;

Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee,

vs.

R.M. "JOHNNIE" BURTON, in her official capacity as Director, Wyoming Department of Revenue,

Defendant-Appellant.

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY,

Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee,

Nos. 00-8087
and 00-8088

(Filed Oct. 24, 2001)

vs.

SLEETER DOVER, in his official capacity as Director of the Wyoming Department of Transportation,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
(D.C. Nos. 00-CV-108-J and 00-CV-109-J)

Submitted on the briefs:*

James W. McBride and Anne M. Stolee, Baker, Donelson, Bearman & Caldwell, Washington, D.C. and W. Perry Dray, Dray, Thompson & Dyekman, P.C., Cheyenne, Wyoming, for Plaintiffs-Appellees.

Stuart E. Schiffer, Acting Assistant Attorney General, David D. Freudenthal, United States Attorney, Mark B. Stern and Stephanie R. Marcus, Department of Justice, Washington, D.C., for Plaintiff-Intervenor-Appellee.

Gay Woodhouse, Attorney General, Vicci M. Colgan, Chief Deputy Attorney General, Michael Dinnerstein and Harold E. Meier, Cheyenne, Wyoming, for Defendants-Appellants.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1(G). The cause therefore is ordered submitted without oral argument.

Before, Kelly, Circuit Judge, MCKAY, Senior Circuit Judge, and BROWN, Senior District Judge.**

KELLY, Circuit Judge.

Defendants-Appellants R.M. "Johnnie" Burton, Director, Wyoming Department of Revenue, and Sleeter Dover, Director, Wyoming Department of Transportation, ("the State") appeal from the district court's order denying their motions to dismiss. We have jurisdiction over these interlocutory appeals pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. *Innes v. Kan. State Univ.*, 184 F.3d 1275, 1277 (10th Cir. 1999) (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (holding that states may take advantage of the collateral order doctrine to appeal district court orders denying claims of Eleventh Amendment immunity)).

Because "we are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court," *United States v. Morris*, 247 F.3d 1080, 1085 (10th Cir. 2001) (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)), we find *Union Pacific Railroad Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999)

** The Honorable Wesley E. Brown, Sr., Senior District Judge, United States District Court – District of Kansas, sitting by designation.

to be controlling and affirm the district court's order denying the motions to dismiss.

Background

Plaintiffs-Appellees Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Co. ("the Railroads") filed two separate complaints challenging the imposition by the State of Wyoming, through Ms. Burton, of a tax on the transportation of coal (No. 00-8087) and, through Mr. Dover, of a tax on railroad train miles and grade crossings (No. 00-8088).[1] Wyo. Stat. Ann. § 39-21-103 (Michie 2001) (coal transportation tax); Wyo. Stat. Ann. § 39-20-104 (Michie 2001) (train mile tax). The Railroads based their challenge on Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"). *See* 49 U.S.C. § 11501. The 4-R Act prohibits states from discriminating by more than 5% in taxing rail transportation property and rail carriers. It also gives federal courts concurrent jurisdiction to hear 4-R Act cases and power to grant injunctive relief. The State moved to dismiss the complaints for lack of subject matter jurisdiction claiming that the 4-R Act is an invalid attempt by Congress to abrogate state sovereign immunity under the Eleventh Amendment. The State argues that this court's precedent in *Union Pacific Railroad Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999), is not controlling

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[1] Because of the similarity of facts and common question of law, we will consolidate the two appeals together in this order and judgement.

because of changes made in Eleventh Amendment jurisprudence by the United States Supreme Court in its subsequent cases *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000), and *Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001). We review the denial of a state's claim of Eleventh Amendment immunity from suit in federal court de novo. *Innes v. Kansas State Univ.*, 184 F.3d 1275, 1277 (10th Cir. 1999).

Discussion

In *Union Pacific Railroad Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999), the Union Pacific Railroad Company and the Utah Railway Company both sought relief against the State of Utah from an allegedly discriminatory property tax under the 4-R Act. The State moved to dismiss on the basis of Eleventh Amendment immunity and the district court granted the motion. The plaintiffs appealed and this court reversed the dismissal holding that the 4-R Act was a valid abrogation of Eleventh Amendment immunity. In reaching its decision in *Union Pacific*, this court relied on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999). Subsequent to the issuance of *Union Pacific*, the Supreme Court decided *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955 (2001). Unless the Supreme Court has changed the appropriate test for determining what is a valid abrogation of Eleventh Amendment immunity in *Kimel* or *Garrett*, *Union Pacific* is controlling precedent and the denial of the motions to dismiss must be affirmed. *See United States v. Morris*, 247

F.3d 1080, 1085 (10th Cir. 2001) (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)).

First, relying on *Florida Prepaid*, this court reiterated in *Union Pacific* that Congress must make an "unmistakably clear expression of congressional intent to abrogate state immunity," *Union Pacific*, 198 F.3d at 1206, and found that Congress had done so in the language of the 4-R Act. *Id.* at 1205-06. *Kimel* and *Garrett* applied this same standard. *See Kimel*, 528 U.S. at 73; *Garrett*, 531 U.S. at ___, 121 S. Ct. at 962. In this action, neither party has argued that Congress did not express its intention to abrogate state immunity.

Second, relying on *Seminole Tribe*, this court noted that "Congress may only abrogate state immunity when it acts pursuant to the legislative authority granted to it by section 5 of the Fourteenth Amendment." *Union Pacific*, 198 F.3d at 1203. Pointing out that the Supreme Court had "left undisturbed the principle that congressional action may be upheld under § 5 even when Congress does not expressly rely on that provision as the source of its abrogation power," this court concluded that the 4-R Act was a valid exercise of congressional authority pursuant to § 5 of the Fourteenth Amendment despite Congress' failure to expressly rely on it. *Id.* at 1203-04. In this action, the State argues that the 4-R Act is not a valid abrogation of sovereign immunity because it was enacted pursuant to Article I's Commerce Clause and not expressly pursuant to section 5. Aplt. Br. at 5. While *Kimel* and *Garrett* do reaffirm that Congress only has the power to abrogate under the Fourteenth Amendment and does not have the power under Article I, neither *Kimel* nor *Garrett* require that Congress expressly rely on section 5. *Kimel*, 528 U.S.

at 78-82; *Garrett*, 531 U.S. at ___, 121 S. Ct. at 961-63. This court's conclusion that the 4-R Act was a valid exercise of Congress' power to enforce the Equal Protection Clause is not, therefore, called into question by Congress's failure to rely expressly on the Fourteenth Amendment. *Union Pacific*, 198 F.3d at 1208.

Third, relying on *City of Boerne*, this court stated that "congressional power under § 5 is remedial in nature, and confers the authority to enforce the Fourteenth Amendment rather than to define its parameters as a matter of substantive law" and that the Supreme Court has established several factors to guide us in determining whether a law enforces or defines. *Id.* at 1204. These factors include: (1) whether the legislative record before Congress indicates that the congressional action taken was necessary and appropriate, (2) whether Congress identified conduct transgressing the Fourteenth Amendment's substantive provision, and (3) whether the remedy is proportional and congruent to the unconstitutional conduct it was enacted to curtail. *Id.* at 1204-05 (citing *City of Boerne* and *Florida Prepaid*). Our "review of the legislative history convince[d the court] that in passing the 4-R Act, Congress was responding to evidence of a pattern of unconstitutional taxation," *id.* at 1206, and "a substantial history of state discrimination in the taxation of railroad property." *Id.* at 1207. This court held that the state conduct identified by Congress was unconstitutional because it violated the Equal Protection Clause. *Id.* at 1208 (citing *Metro Life Ins. Co. v. Ward*, 470 U.S. 869 (1985)). Taking into consideration that only injunctive relief is available and the 5% threshold, we held that the

remedy is "congruent with and in proportion to the Equal Protection violation." *Id.* at 1208.

In this action, the State argues that the R-4 [sic] Act is not a valid abrogation of sovereign immunity because it redefines rather than enforces the Fourteenth Amendment. Aplt. Br. at 6. In support of this assertion, the State claims that in *Kimel* the Supreme Court identified two new factors for determining if a statute permissibly enforces or impermissibly defines the Fourteenth Amendment. Aplt. Br. at 4. These factors are: whether the legislation prohibits substantially more practices than the Fourteenth Amendment does, and whether the history of the legislation reflects a pattern of activity by the states that violates the Fourteenth Amendment. *Id.*

As to the substantially more practices factor, the State claims that the R-4 [sic] Act prohibits all discrimination against railroads while the Equal Protection Clause either does not prohibit discrimination or prohibits only irrational discrimination. Aplt. Br. at 11. Assuming for the sake of argument that the Supreme Court did establish a new "substantially more practices" factor for consideration in *Kimel*,[2] it does not follow that the State would

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[2] This seems unlikely because, in *Kimel*, the Supreme Court describes its decisions in *City of Boerne* and *Florida Prepaid* with approval and states that it is applying the same test for congruence and proportionality. *Kimel*, 528 U.S. at 80-83. Likewise, *Garrett* quoted *City of Boerne* when it stated "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.' " *Garrett*, 531 U.S. at ___, 121 S. Ct. at 963. Given these statements by the Supreme Court, this court is inclined to agree

then prevail. First, the State has overlooked the fact that the R-4 [sic] Act prohibits only discrimination that rises above the 5% threshold. 49 U.S.C. § 11501(c). Second, this court in *Union Pacific* already established that discriminatory taxation of railroads violates the Equal Protection Clause. *Union Pacific,* 198 F.3d at 1206-08. Third, even if the R-4 [sic] Act does prohibit some rational discrimination against railroads which the Equal Protection Clause might not prohibit, the Supreme Court has "never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Kimel,* 528 U.S. at 88.

> Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence. "Rather, Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."

Garrett, 531 U.S. at ___, 121 S. Ct. at 963 (quoting *Kimel,* 528 U.S. at 81). Finally, it is clear that this alleged "substantially more practices" factor is not determinative. *Kimel,* 528 U.S. at 88 ("That the ADEA prohibits very little conduct to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry."); *id.* at 91. It is merely another factor to be considered along with other factors.

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with the Railroads' suggestion that "substantially more practices" is merely a new descriptive phrase. Aplee. Br. at 13.

As to whether the history of the legislation reflects a pattern of activity by the states that violates the Fourteenth Amendment, this factor was also addressed in *Union Pacific*. This court's "review of the legislative history convince[d the court] that in passing the 4-R Act, Congress was responding to evidence of a pattern of unconstitutional taxation," *Union Pacific*, 198 F.3d at 1207, and "a substantial history of state discrimination in the taxation of railroad property." *Id.* at 1206. Although the State repeatedly cites to the congressional record, we reviewed that record in *Union Pacific*. As stated above, we cannot overrule the judgement of another panel of this court absent en banc reconsideration or a superseding contrary decision by the Supreme Court. *United States v. Morris*, 247 F.3d 1080, 1085 (10th Cir. 2001) (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993)). Because we hold that *Union Pacific* survives *Kimel* and *Garrett*, no further review of the congressional record is necessary. *See Kimel*, 528 U.S. at 89; *Garrett*, 531 U.S. at ___, 121 S. Ct. at 967.

In sum, we conclude that the Supreme Court's recent decisions did not contradict *Union Pacific*, it remains controlling precedent, and the 4-R Act is a valid congressional abrogation of state immunity. We, therefore, AFFIRM the district court's denial of the motions to dismiss but express no opinion on the merits of the Railroads' claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, and UNION PACIFIC RAILROAD CO.,	)	
Plaintiffs,	)	No. 00-CV-108-J
v.	)	
R. M. "JOHNNIE" BURTON, DIRECTOR, WYOMING DEPARTMENT OF REVENUE,	)	
Defendant.	)	

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, and UNION PACIFIC RAILROAD CO.,	)	
Plaintiffs,	)	No. 00-CV-109-J
v.	)	
SLEETER DOVER, DIRECTOR, WYOMING DEPARTMENT OF TRANSPORTATION,	)	
Defendant.	)	

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

(Filed Nov. 20, 2000)

The Motions to Dismiss filed by the defendants in the above captioned proceedings, plaintiffs' responses filed in opposition thereto, the defendants' further replies, as

well as the defendants' Statements of Reconsideration, appealing the Magistrate Judge's related dispositions, have all come before the Court for consideration. A hearing was held on the motions to dismiss on October 13, 2000, with the plaintiffs appearing through counsel, Greg Dyekman, James McBride, and Ann Stolee, and defendants appearing through counsel, Vicci Colgan, Michael Dinnerstein, and Harold Meier, all of the Office of the Wyoming Attorney General. The Court, having considered the parties' written submissions and the materials offered in support of their respective positions, the pleadings of record, the applicable law, the arguments of counsel, and being fully advised, FINDS and ORDERS as follows:

Background

The complaints filed in these cases challenge the imposition by the State of Wyoming, through the defendant Director of the Wyoming Department of Revenue of a tax imposed on the transportation of coal (Case No. 00-CV-108J), and through the defendant Director of the Wyoming Department of Transportation of a tax on railroad train miles and grade crossings (Case No. 00-CV-109J). The plaintiff railroads filed suit pursuant to Section 306 of the Railroad Regulatory and Revitalization Act of 1976 ("4-R Act"), codified at 49 U.S.C. § 11501, alleging the taxes single out railroads for the imposition of discriminatory taxes contrary to federal law. Section 306 of the 4-R Act prohibits discriminatory state taxation of railroads and grants federal district courts jurisdiction to grant injunctive relief preventing such discriminatory taxation.

The State defendants have moved to dismiss these actions, asserting that the suits are barred by the Eleventh Amendment to the United States Constitution and that the suits are barred by the doctrine of sovereign immunity. They rely on recent the United States Supreme Court holding in *Kimel v. Florida Board of Regents,* 120 S.Ct. 631 (2000), to provide support for their arguments that this case cannot be pursued under applicable principles of sovereign immunity.

The State of Wyoming argues that the two cases should be dismissed on jurisdictional grounds and that the suits are barred by the Eleventh Amendment to the United States Constitution. These motions raise issues created by *Seminole Tribe of Florida v. Florida,* 116 S.Ct. 1114 (1996) and the case law that has followed on its heels addressing these sovereign immunity issues and the scope of congressional abrogation of state sovereign immunity in enacting legislation that affects states.

The State defendants argue that Congress does not have the power to enforce the commerce clause by abrogating sovereign immunity and that because the 4-R act was enacted pursuant to the commerce clause, the Act's abrogation of sovereign immunity is not valid. The State defendants assert that the 4-R act was not enacted pursuant to Congress' powers under Section 5 of the Fourteenth Amendment. They contend that by the time that the Act was passed, the Supreme Court had repeatedly held that the Fourteenth Amendment did not prohibit states from treating railroads differently from other classes of taxpayers. The State defendants contend that testimony before Congress supports the conclusion that the Act was not enacted pursuant to the Fourteenth

Amendment, as does the plain text of the Act and subsequent case law.

If the Act was enacted pursuant to the Fourteenth Amendment, the State argues alternatively that Congress' power was not validly exercised to abrogate sovereign immunity to enforce the Fourteenth Amendment. It also argues that the *Ex Parte Young* doctrine does not permit suits against individual officials pursuant to the Act because states have special sovereignty interests in their systems of taxation, there is an adequate state forum, and the remedy Congress provided for violations of the Act is a limited remedy.

To the contrary, the plaintiff railroads argue that the Act constitutes the exercise of legitimate congressional power to enforce equal protection of the law pursuant to Section 5 of the Fourteenth Amendment. The railroads rely on *Union Pacific Railroad Company v. Utah,* 198 F.3d 1201 (10th Cir. 1999), which has addressed this issue and determined that the 4-R Act is a valid abrogation of sovereign immunity. The plaintiff railroads argue that the later Supreme Court case of *Kimel v. Florida Board of Regents,* 120 S.Ct. 631 (2000), upon which the state defendants have relied, does not alter this conclusion.

This is the real issue now before this Court for consideration. How does *Kimel* change the equation and how should it apply to the facts at issue in this case?

The plaintiff railroads argue that the 4-R Act was a valid means both to provide a remedy and to deter violations of the railroads' equal protection rights. They argue that this Court also has jurisdiction over the case pursuant to *Ex Parte Young,* 209 U.S. 123 (1908), regardless of

the validity of 4-R Act's abrogation provisions. The *Ex Parte Young* doctrine provides an additional and independent basis for this Court's jurisdiction over the case. The plaintiff railroads argue that the requirements for *Ex Parte Young* relief are: "a *Young* suit is available where a plaintiff alleges an ongoing violation of federal law and where the relief sought is prospective rather than retrospective[,]" citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). Here, the plaintiff railroads are requesting a prospective injunction against future and ongoing attempts of the State defendants to collect taxes which violate federal law. As long as taxes remain unpaid, there is still future action by a State officer that can be enjoined.

The Magistrate's Judge has held that the Tenth Circuit's decision in *Union Pacific R.R. Co. v. Utah*, 198 F.3d 1201 (10th Cir. 1999) is dispositive and determined that the State defendants are not entitled to immunity and must therefore participate in discovery pursuant to the Local Rules of this Court.

Standard of Review

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, a motion to dismiss may be granted when the district court lacks subject matter jurisdiction. Where the motion to dismiss raises a factual challenge to the existence of subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. This is contrasted to a motion to dismiss asserting a facial attack that challenges the sufficiency of the complaint's factual allegations, when a district court must accept the allegations in the complaint as true. See

Holt v. United States, 46 F.3d 1000, 1002-1003 (10th Cir. 1995).

A court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1). *Id.* In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 summary judgment motion.

Unless the jurisdictional issue is intertwined with the merits of the plaintiff's case, a district court may properly consider evidence outside of the pleadings and resolve factual disputes without converting the motion into a Rule 56 motion. Where resolution of the jurisdictional issue – i.e., whether the state defendants are entitled to Eleventh Amendment immunity – does not depend on the factual allegations underlying the plaintiffs' substantive claims, the motion may be properly be resolved pursuant to Rule 12(b)(1). On appeal, a district court's dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) will be subject to *de novo* review, with findings of jurisdictional facts reviewed for clear error. *Id.*

Discussion

The Court finds that the motions to dismiss filed by the State should be denied and further finds that the Magistrate Judge's rulings should be affirmed in all respects, for the reasons to be discussed below.

Contrary to the State's assertions, the Court finds that the Supreme Court's *Kimel* decision does not change in any meaningful way the analysis of the Tenth Circuit in the

Utah case upholding the 4-R Act, after considering similar Eleventh Immunity arguments in that case. *Kimel* did not enunciate a new test to be applied in analyzing whether Congress has appropriately exercised its enforcement power under the Fourteenth Amendment in abrogating the states' sovereign immunity.

The State defendants contend that because Congress enacted the 4-R Act pursuant to the Commerce Clause of the United States Constitution, the Act's abrogation of sovereign immunity is not valid. The Tenth Circuit considered similar arguments in *Union Pacific Railroad Company v. State of Utah,* 198 F.3d 1201 (10th Cir. 1999) and found that the 4-R Act was a valid abrogation of states' Eleventh Amendment immunity and that discriminatory taxation of railroads, whether in violation of state provisions or pursuant to them, was the proper object of Congress' power under Section 5 of the Fourteenth Amendment.

Generally applicable principles of law are embodied in the following provisions. The Eleventh Amendment of the United States Constitution states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. This immunity is not absolute. "A state may consent to be sued in federal court, or Congress may abrogate sovereign immunity. To abrogate Eleventh Amendment immunity, Congress must have 'unequivocally expresse[d] its intent to abrogate the immunity' and 'acted pursuant to a valid exercise of power.' " *Union Pacific R.R. Co. v. State of Utah,* 198 F.3d at

1203, quoting *Migneault v. Peck*, 158 F.3d 1131, 1135 (10th Cir. 1998).

The Tenth Circuit noted that the United States Supreme Court concluded that "Congress may only abrogate state immunity when it acts pursuant to the legislative authority granted to it by section 5 of the Fourteenth Amendment," *id.*, citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59, 65-66, 116 S.Ct. 11154, 134 L.Ed.2d 252 (1996). In its instructive opinion, the circuit court continued:

> In *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the Court analyzed the scope of congressional power under § 5, providing the analysis by which we determine whether a congressional abrogation of Eleventh Amendment immunity is a valid exercise of that power. In so doing, the Court articulated several governing principles that we set out below as a framework for our consideration of the validity of the abrogation contained in § 11501 of the 4-R Act.
>
> The Fourteenth Amendment restricts the power of the states by providing that
>
> > [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. amend. XIV, § 1. Congressional power to abrogate state immunity is contained in § 5, which provides that "[t]he Congress shall

have power to enforce, by appropriate legislation, the provisions of this article." Id. § 5.

In considering the interplay of these two provisions and the scope of Congress' power under them, the Court initially observed that § 5 is a broad grant of authority. *City of Boerne*, 521 U.S. at 517, 117 S.Ct. 2157.

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 5517-18, 117 S.Ct. 2157 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-56, 25 L.Ed. 676 (1879)). Accordingly, the Court reiterated the principle that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.' " . . . Moreover, the Court left undisturbed the principle that congressional action may be upheld under § 5 even when Congress does not expressly rely on that provision as the source of its abrogation power. See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) [footnote omitted]; see also *Fullilove v. Klutznick*, 448 U.S. 448, 478, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980); *Katzenbach v. Morgan*, 384 U.S. 641, 650-51, 86

S.Ct. 1717, 16 L.Ed.2d 828 (1966); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4, at 037 n. 6 (2d ed. 1988) ("An otherwise valid exercise of congressional authority is not, of course, invalidated if Congress happens to recite the wrong clause . . . as the source of its power – or, indeed, if Congress recites no clause at all.").

The Court cautioned, however, "that '[a]s broad as the congressional enforcement power is, it is not unlimited' " *City of Boerne*, 521 U.S. at 518, 117 S.Ct. 2157 . . . the court pointed out that congressional power under § 5 is remedial in nature, and confers the authority to enforce the Fourteenth Amendment rather than to define its parameters as a matter of substantive law . . . While recognizing that the line between remedy and substance is not easy to discern, the Court emphasized that "the distinction exists and must be observed." . . . Accordingly, the Court established several factors to guide an assessment of whether an abrogation of immunity under § 5 is a valid remedial measure of an impermissible substantive change in the governing law.

The Court stated that legislation adopted under the enforcement clause must be judged with reference to the historical experience it reflects, . . . and that the "appropriateness of remedial measures must be considered in light of the evil presented[.]" . . . In assessing this factor, the Court looked to the legislative record before Congress as an indication that the congressional action taken was necessary and appropriate. The Court noted that lack of evidentiary support is not conclusive.

Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but "on due regard for the decision of the body constitutionally appointed to decide." As a general matter, it is for Congress to determine the method by which it will reach a decision.

. . .

Accordingly, the Court also looked to whether the legislation was proportional to its remedial or preventive object and could thus "be understood as responsive to, or designed to prevent, unconstitutional behavior." . . . The Court cautioned that the sweep of remedial legislation must be congruent with and carefully directed to the scope of the unconstitutional conduct it was enacted to curtail. *Id.* at 532-34, 117 S.Ct. 2157.

> This is not to say, of course, that § 5 legislation requires termination dates, geographic restrictions or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5.

. . . .

In its most recent examination of Congress' power under § 5, the Court reiterated and applied its holdings in *City of Boerne* that "for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid Postsecondary Educ.*

> *Expense Bd. v. College Sav. Bank*, 527 U.S. 6237, ___, 119 S.Ct. 2199, 2207, 144 L.Ed.2d 575 (1999). The Court emphasized that while the lack of legislative history showing that Congress was responding to a history of constitutional violations is not determinative, "identifying the targeted constitutional wrong or evil is still a critical part of our § 5 calculus because '[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one.' " *Id.* at 2210 (quoting *City of Boerne*, 521 U.S. at 530, 117 S.Ct. 2157).
>
> The Court has thus made clear that legislation is more likely to be considered a valid exercise of Congress' § 5 authority if it is supported by a legislative record showing the extent of state conduct violative of the Fourteenth Amendment, and if it is carefully drawn to target that conduct.

Union Pacific Railroad Company v. State of Utah, 198 F.3d at 1203-1205 (most citations and footnote omitted).

The Tenth Circuit then went on to apply the above general principles in determining the validity of the abrogation of the Eleventh Amendment immunity contained in the 4-R Act, which is the subject of the instant litigation as well. The applicable substantive provision of the 4-R Act is set out in the opinion as follows:

> The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:
>
> (1) Assess rail transportation property at a value that has a higher ratio to the true market

value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

49 U.S.C. § 11501(b).

Id., 198 F.3d at 1205. Further:

The abrogation of Eleventh Amendment immunity which the Railroads contend permits their suit for relief under the Act provides:

> Notwithstanding section 1341 of title 28 [the Tax Injunction Act [footnote omitted]] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation

property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law.

49 U.S.C. § 111502(c).

To determine whether the above provision is a valid abrogation of state sovereign immunity, we must determine whether Congress unequivocally expressed its intent to abrogate, and whether it acted pursuant to a valid exercise of power. . . . The statute contains an unmistakably clear expression of congressional intent to abrogate state immunity and the parties do not argue otherwise. We therefore must ascertain whether the 4-R Act is a legitimate exercise of Congress' § 5 power.

Following the principles laid down by the Supreme Court, we look first to Congress' identification of the unconstitutional state conduct it intended to remedy in passing the 4-R Act. We begin with the legislative record, which reveals a substantial history of state discrimination in the taxation of railroad property. As the Supreme Court has observed, "[a]fter an extended period of congressional investigation, Congress concluded that 'railroads are overtaxed by at least $50 million each year.' " *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457, 107 S.Ct. 1855, 95 L.Ed.2d 404 (1987) (quoting H.R.REP. No. 94-725, at 78 (1975)). The legislative history makes clear that the 4-R Act is intended to eliminate "discriminatory State and local taxation of common and contract carrier transportation property . . . as

an unreasonable and unjust discrimination against . . . interstate commerce." S.REP. NO. 91-630, at 1 (1969)).

> In essence, the provisions of [section 11501] are designed to put an end to the widespread practice of treating for tax purposes the property of common and contract carriers on a different basis than other property in the same taxing district. In describing the extent of discriminatory tax treatment by State and local governments, the Doyle report states that "despite State laws requiring uniform tax treatment, railroads and pipelines are discriminated against as compared to other property taxpayers in the same jurisdiction, due in large measures to outdated procedures (which are sometimes deliberately retained) for assessment of property," and went on to state that [the committee] had information "showing the extent of overpayment of railroad ad valorem taxes resulting from the assessment of railroad property at a percent of its value that is higher than the percent for the assessment of other taxpayer property is to the value of such other property"; and that "This confirmed the findings of this committee that there is a studied and deliberate practice of assessing railroad property at a proportion of full value substantially higher than other property subject to the same tax rates."

Id. at 2. . . . The report also states that "[i]n the last 9 years, the railroads alone have been

assessed more than $900 million in discriminatory taxes." *Id.* at 3. Indeed, the legislative history is replete with evidence of widespread, long-standing and deliberate "discriminatory taxation of interstate common carrier transportation property." *Id.* at 4.

The legislative history sets out Congress' findings that the discriminatory state taxation of interstate railroads runs afoul of the constitution in two ways. First, it may violate the rational basis requirement of the Equal Protection Clause by arbitrarily discriminating against a particular taxpayer contrary to "the applicable State laws or constitutional provisions." *Id.* at 7. Second, it may violate equal protection by placing interstate carriers in a separate tax category which, while permitted by state law, impermissibly discriminates against interstate commerce. *Id.* [footnote omitted]

In addition, Congress took note of the procedural barriers which prevented railroads from obtaining effective relief in state courts. Despite its profound respect for state sovereignty in taxation matters embodied in the Tax Injunction Act, Congress passed § 11501 as an explicit exception to that Act, stating that the effect of the Tax Injunction Act

> has been to close the doors of the Federal courts to carriers affected by discriminatory taxation. It has not, however, insured that the State courts provide carriers with a plain, speedy, and efficient remedy.
>
> The testimony before the committee indicated that present State procedures to challenge discriminatory State tax

> assessments are often difficult, time consuming, and not productive of material relief. For example, the Southern Pacific and its rail affiliates were required to bring 48 separate suits in 48 separate California superior courts to challenge the level of assessments of railroad property by 48 counties and cities in California.

Id. at 6-7. In sum, our review of the legislative history convinces us that in passing the 4-R Act, Congress was responding to evidence of a pattern of unconstitutional taxation.

The type of arbitrary state discrimination against interstate railroads in the assessment and collection of taxes that disturbed Congress was subsequently well illustrated in *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). There, an assessor's valuation practices resulted in the taxation of generally comparable property at rates different than those applied to the railroad in violation of the state constitutional guarantee of equal and uniform taxation. The Supreme Court held the practice unconstitutional, stating that " '[t]he equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.' " . . . Underlying the Court's decision was the state's failure to justify a discriminatory taxing practice as reasonably related to a legitimate state policy when it violated an expressed state policy of equal and uniform taxation. . . . Thus, Congress' concern as set out in

> the legislative history of the 4-R Act that railroads were the victims of arbitrary discriminatory taxation in violation of state provisions requiring equal and uniform taxation clearly supports the enactment of that legislation under the Equal Protection Clause.
>
> Moreover, classifications that are permitted by state law but result in invidious discrimination against interstate commerce are also property the subject of remedial action under the Equal Protection Clause. In *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985), the Supreme Court traced the "checkered history" of its "jurisprudence of the applicability of the Equal Protection Clause to discriminatory tax statutes," . . . and held that a state violates equal protection when it imposes " 'more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose[.] . . . We thus conclude that the discriminatory taxation of railroads, whether in violation of state provisions or pursuant to them, is a proper object of Congress' power under § 5 to remedy violations of the Equal Protection Clause.

Id., 198 F.3d at 1205-1208 (most citations, quotations and footnotes omitted).

The circuit court then turned to the second part of the inquiry enunciated by the Supreme Court in *City of Boerne*, examining whether the provision at issue is tailored to remedying or preventing the history of constitutional violations set out above. It stated:

> We begin by observing that, unlike the statute the Court condemned in *City of Boerne*, § 11501 of the 4-R Act is not broad, sweeping legislation that intrudes on state conduct unrelated to the targeted violation. To the contrary, § 11501 is directed at the discriminatory assessment and collection of railroad taxes, and provides a remedy only when such discrimination passes a threshold of five percent. Moreover, the Act permits only injunctive relief and further provides that state law is to govern the burden of proof. The remedy is therefore congruent with and in proportion to the Equal Protection violation. This congruence between the act's remedial or preventative means and the legitimate end it seeks to achieve convinces us that it is a proper exercise of Congress' power under § 5. Accordingly, we join those circuits that have addressed the issue and hold that § 11501 abrogates Eleventh Amendment immunity. See *Wheeling & Lake Erie Ry. Co. v. Public Utility Comm'n*, 141 F.3d 88 (3d Cir. 1998), *cert. denied*, No. 99-86, 120 S.Ct. 323, and No. 99-234, 120 S.Ct. 324; *Oregon Short Line R.R. Co. v. Department of Revenue*, 139 F.3d 1259 (9th Cir. 1998).
>
> * * * *

Id., 198 F.3d at 1208 (most citations omitted).

As stated earlier in this opinion, the State defendants urge this Court to find that the United States Supreme Court's opinion in *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631 (2000), dictates a result contrary to that reached by the Tenth Circuit in its *Union Pacific Railroad Company v. State of Utah*, 198 F.3d 1201 (10th Cir. 1999). This Court disagrees.

In *Kimel,* the Supreme Court determined that the Age Discrimination in Employment Act ("ADEA") did not validly abrogate states' Eleventh Amendment immunity from suit by private individuals. The *Kimel* court recognized that the ADEA did contain a clear statement of Congress' intent to abrogate states' immunity, but further determined that abrogation exceeded Congress' authority under the endorsement clause, Section 5, of the Fourteenth Amendment. In reaching that conclusion, the Supreme Court considered, and rejected, the argument that the ADEA rested solely on Congress' Article I commerce power. "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel,* 120 S.Ct. at 644. The Supreme Court stated:

> Nevertheless, we have also recognized that the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power. For example, Congress cannot "decree the *substance* of the Fourteenth Amendment's restrictions on the States. . . . It has been given the power 'to enforce,' not the power to determine *what constitutes* a constitutional violation." [citing *City of Boerne,* 521 U.S. 507], at 519, 117 S.Ct. 2157 [emphasis in original]. The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch. *Id.,* at 536, 117

S.Ct. 2157. In *City of Boerne*, we noted that the determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult. *Id.*, at 519-520, 117 S.Ct. 2157. The line between the two is a fine one. Accordingly, recognizing that "Congress must have wide latitude in determining where [that line] lies," we held that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520, 117 S.Ct. 2157.

In *City of Boerne*, we applied that "congruence and proportionality" test and held that the Religious Freedom Restoration Act of 1993 (RFRA) was not appropriate legislation under § 5. We first noted that the legislative record contained very little evidence of the unconstitutional conduct purportedly targeted by RFRA's substantive provisions. Rather, Congress had uncovered only "anecdotal evidence" that, standing alone, did not reveal a widespread pattern of religious discrimination in this country." *Id.*, at 531, 117 S.Ct. 2157. Second, we found that RFRA is "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*, at 532, 117 S.Ct. 2157.

Last Term, we again had occasion to apply the "congruence and proportionality" test. In *Florida Prepaid*, we considered the validity of the Eleventh Amendment abrogation provision in the Patent and Plant Variety Protection Remedy

> Clarification Act (Patent Remedy Act). We held that the statute, which subjected States to patent infringement suits, was not appropriate legislation under § 5 of the Fourteenth Amendment. The Patent Remedy Act failed to meet our congruence and proportionality test first because "Congress identified no pattern of patent infringement *by the States*, let alone a pattern of constitutional violations." 527 U.S., at ___, 119 S.Ct., at 2207 [emphasis in original]. Moreover, because it was unlikely that many of the acts of patent infringement affected by the statute had any likelihood of being unconstitutional, we concluded that the scope of the Act was out of proportion to its supposed remedial or preventive objectives. . . . Instead, "[t]he statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime." . . . While we acknowledged that such aims may be proper congressional concerns under Article I, we found them insufficient to support an abrogation of the States' Eleventh Amendment immunity after *Seminole Tribe. Florida Prepaid*, supra, at ___, 119 S.Ct., at 2211.

Kimel, 120 S.Ct. at 744-645 (most citations omitted).

The Supreme Court applied the congruence and proportionality tests to conclude that the ADEA was not appropriate legislation under section 5 of the Fourteenth Amendment. It noted that the substantive requirements imposed by the ADEA on state and local governments were disproportionate to any unconstitutional conduct that could be targeted by the ADEA. Age classifications were not, historically, deemed to reflect prejudice and

antipathy and older persons had not been subjected to a history of purposeful unequal treatment. *Id.* at 645. Age did not define a "discrete and insular minority because all persons, if they live out their normal life spans, will experience it." *Id.* After reviewing a significant body of law concerning the ADEA, the Supreme Court stated:

> That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. Our task is to determine whether the ADEA is in fact just such an appropriate remedy, or instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination. One means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress' action. . . . "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." . . .
>
> Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. . . .
>
> * * * *

> A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. Although that lack of support is not determinative of the § 5 inquiry, . . . Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field. In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid.

Kimel, 120 S.Ct. at 648-650 (most citations omitted).

The Court agrees with the plaintiff railroads' assertion that *Kimel* broke no new ground and merely applied the principles set out by the United States Supreme Court initially in *Seminole Tribe,* followed later by *City of Boerne v. Flores* and the subsequent line of cases analyzing these Eleventh Amendment/abrogation issues.[1] Specifically, *Kimel* considered (1) whether Congress has unequivocally expressed its intention to abrogate sovereign immunity of

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[1] The district court in Utah stated, in a case considering the same issues with respect to the Americans with Disabilities Act ("ADA"), that "[t]he *Kimel* Court merely applied the previous tests it had announced in *Seminole Tribe* and refined in *City of Boerne." Davis v. Utah State Tax Commission,* 96 F.Supp.2d 1271, 1277 (D.Utah 2000).

the States under the ADEA (clear statement of Congressional intent to abrogate sovereign immunity of the states) and (2) whether Congress acted pursuant to a valid grant of constitutional authority – i.e., whether abrogation was within Congress's authority under § 5 of the Fourteenth Amendment. The Supreme Court in *Kimel* applied these principles to find clear intent to abrogate sovereign immunity, but concluded that it was not pursuant to a valid grant of constitutional authority. The *City of Boerne* "congruence and proportionality" test was applied by the Supreme Court in *Kimel,* leading to the conclusion that the ADEA was not appropriate legislation under § 5 of the Fourteenth Amendment.

The Tenth Circuit's *Union Pacific Railroad Company v. State of Utah,* 198 F.3d 1201 (10th Cir. 1999) predates the *Kimel* decision, but its analysis is consistent with the principles applied by the Supreme Court in *Seminole Tribe, City of Boerne,* and *Kimel,* in that it considered carefully and identified the evil Congress intended to remedy, to be judged with reference to historical experience in determining that Congress acted pursuant to its enforcement power under § 5 of the Fourteenth Amendment. The Tenth Circuit also looked power under § 5 of the Fourteenth Amendment. The Tenth Circuit also looked to whether the legislation was proportional to its remedial or preventive object, applying the congruence and proportionality test from the *City of Boerne.* This Court perceives little in *Kimel* that would compel it to conclude that the Tenth Circuit's decision in *Union Pacific Railroad Company v. State of Utah,* 198 F.3d 1201 (10th Cir. 1999) should have been decided differently. See also *Wheeling & Lake Erie Railway Company v. Public Utility*

Commission of the Commonwealth of Pennsylvania, 141 F.3d 88 (3d Cir. 1998) (finding Congress validly abrogated Eleventh Amendment immunity, pursuant to its enforcement powers under § 5 of the Fourteenth Amendment, when it enacted 4-R Act); *Oregon Short Line Railroad Company v. Department of Revenue Oregon,* 139 F.3d 1259 (9th Cir. 1998) (upholding 4-R Act, finding it properly abrogated State's Eleventh Amendment immunity); *CSX Transportation, Inc. v. Bd. of Public Works of the State of West Virginia,* 138 F.3d 537 (4th Cir. 1998) (declining to resolve question whether abrogation of sovereign immunity is valid or invalid, instead relying upon *Ex Parte Young* doctrine for its analysis). The Tenth Circuit has also considered how *Kimel* affected prior Tenth Circuit precedent with respect to the ADA, and cited with favor the district court's opinion in *Davis v. Utah State Tax Commission,* 96 F.Supp.2d 1271, 1277 (D.Utah 2000), concluding that the ADA's abrogation of Eleventh Amendment immunity is "sound and need not be altered because of the analysis in *Kimel.*" *Cisneros v. Wilson,* 2000 WL 1336658, *11. The Tenth Circuit does not appear to perceive *Kimel* as effecting a sweeping change in the manner in which Eleventh Amendment abrogation issues should be analyzed. With the benefit of this illumination, this court doubts that the Tenth Circuit's analysis of the 4-R Act would change significantly, contrary to the position asserted by the State defendants in this case.

For these reasons, the Court concludes that the defendants' motions to dismiss should be DENIED and further concludes that the defendants' motions to reconsider the rulings of the Magistrate Judge should be denied and that the rulings of the Magistrate Judge in his

September 29, 2000 Orders Ruling on Defendants' Motions to Stay Discovery and Request for Protective Order and Orders on Initial Pretrial Conference issued October 24, 2000 should be affirmed in all respects. Further, because of this disposition, the Court declines the parties' request to rule on the *Ex Parte Young* issues raised by the parties' in their written submissions. Accordingly, it is therefore

ORDERED that the defendants' Motions to Dismiss shall be, and are, **DENIED. It is further**

ORDERED that the rulings of the Magistrate Judge in his September 29, 2000 Orders Ruling on Defendants' Motions to Stay Discovery and Request for Protective Order and October 24, 2000 Orders on Initial Pretrial Conference shall be, and are, **AFFIRMED IN ENTIRETY. It is further**

ORDERED that the defendants' Motions to Reconsider (Statements of Reconsideration) the rulings of the Magistrate Judge shall be, and are, **DENIED.**

Dated this 20th day of November 2000.

/s/ Alan B. Johnson
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY;

Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee,

v.

R.M. "JOHNNIE" BURTON, in her official capacity as Director, Wyoming Department of Revenue,

Defendant-Appellant.

No. 00-8087 and 00-8088

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY,

Plaintiffs-Appellees,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee,

v.

SLEETER DOVER, in his official capacity as Director of the Wyoming Department of Transportation,

Defendant-Appellant.

ORDER

Filed January 31, 2002

Before **KELLY, McKAY**, Circuit Judges and **BROWN*** Senior District Judge.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Steve Larson
Deputy Clerk

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* The Honorable Wesley E. Brown, Sr., Senior District Judge, United States District Court, District of Kansas, sitting by designation.

UNITED STATES CONSTITUTION

The Commerce Clause of Section 8 of Article I

Powers of Congress.

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes

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The Eleventh Amendment

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall a State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE

The Railroad Revitalization and Regulatory Reform Act (4-R Act)

49 U.S.C. § 10101

§ 10101. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government –

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Board;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to encourage honest and efficient management of railroads;

(10) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(11) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(12) to prohibit predatory pricing and practices, to avoid undue concentrations of market power, and to prohibit unlawful discrimination;

(13) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information;

(14) to encourage and promote energy conservation; and

(15) to provide for the expeditious handling and resolution of all proceedings required or permitted to be brought under this part.

49 U.S.C. § 11501

§ 11501. Tax discrimination against rail transportation property

(a) In this section –

(1) the term "assessment" means valuation for a property tax levied by a taxing district;

(2) the term "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation;

(3) the term "rail transportation property" means property, as defined by the Board, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Board under this part; and

(4) the term "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.

(3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section –

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true

market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

WYOMING STATUTE
TITLE 39. TAXATION AND REVENUE
CHAPTER 20. TAX ON RAILROADS

§ 39-20-101. Definitions

(a) As used in this chapter:

(i) "Train mile" means each mile traveled by a train in this state regardless of the number of cars in the train.

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§ 39-20-102. Administration

The department of transportation shall enforce the provisions of this chapter.

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§ 39-20-103. Imposition

There is levied an excise tax on each railroad transporting freight in this state. The tax shall be independent of any assessment of costs for benefits received by the railroad from projects for the construction, rehabilitation, relocation or modification of railroad grade separation facilities.

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§ 39-20-104. Taxation rate

The tax shall be levied at the rate of seven cents ($.07) for each train mile operated by the railroad in the state and one hundred dollars ($100.00) for each public grade crossing on the line of the railroad in this state.

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§ 39-20-105. Exemptions

There are no specific applicable provisions for exemptions for this chapter.

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§ 39-20-106. Licensing; permits

There are no specific applicable provisions for licensing and permits for this chapter.

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§ 39-20-107. Compliance; collection procedures

(a) Returns and reports. On or before May 1 of each year, each railroad shall submit to the department of transportation a report of its total train miles operated within the state during the previous calendar year and the number of public grade crossings on its line in the state at the close of the previous year.

(b) Payment. All taxes shall be due on the date of reporting and shall be delinquent if not paid on or before May 1. The department of transportation shall collect the tax due pursuant to this chapter from each railroad transporting freight within the state.

(c) Timelines. There are no specific applicable provisions for timelines for this chapter.

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§ 39-20-108. Enforcement

(a) Audits. There are no specific applicable provisions for audits for this chapter.

(b) Interest. Interest at an annual rate equal to the average prime interest rate as determined by the state treasurer during the preceding fiscal year plus four percent (4%) shall be added to all delinquent taxes under this chapter. To determine the average prime interest rate, the state treasurer shall average the prime interest rate for at least seventy-five percent (75%) of the thirty (30) largest banks in the United States. The interest rate on delinquent taxes shall be adjusted on January 1 of each year following the year in which taxes first became delinquent. In no instance shall the delinquent tax rate be less than twelve percent (12%) nor greater than eighteen percent (18%).

(c) Penalties. The following shall apply:

(i) If any person fails to make or file a return and remit the tax as required by this chapter the department shall impose a penalty of five percent (5%) of the taxes due for each thirty (30) day period, or fraction thereof, elapsing between the due date of the return and the date filed, unless the person for good cause obtains from the department an extension of time for filing prior to the due date for filing. In no event shall the total penalty imposed by this paragraph exceed twenty-five percent (25%) of the tax due. The department, for good cause, may waive all or a portion of any penalty imposed for failure to file a return timely, provided that:

(A) The return was filed within five (5) business days following the due date,

including an approved extensions period; and

(B) The taxpayer requests the waiver in writing within fifteen (15) days after the return was filed, setting forth the reasons for the late filing.

(ii) If any part of a tax deficiency is due to negligence or intentional disregard of rules and regulations there shall be added a penalty of five percent (5%) of the amount of the deficiency plus interest as provided by subsection (b) of this section. The taxes, penalty and interest shall be paid by the taxpayer within ten (10) days after receipt of notice and demand by the department;

(iii) Taxes due together with interest, penalties and costs shall be collectible by the department by appropriate judicial proceedings;

(iv) The department may credit or waive penalties imposed by this section as part of a settlement or for any other good cause.

(d) Liens. Any delinquent tax is a lien upon the property of any owner from and after the time the tax is due until the tax is paid. The tax lien shall have preference over all liens except any valid mortgage or other liens of record filed or recorded prior to the date the tax became due.

(e) Tax sales. There are no specific applicable provisions for tax sales for this chapter.

§ 39-20-109. Taxpayer remedies.

There are no specific applicable provisions for taxpayer remedies for this chapter.

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§ 39-20-110. Statute of limitations

There are no specific applicable provisions for a statute of limitations for this chapter.

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§ 39 20-111. Distribution

All money derived from the tax imposed by this chapter shall be deposited into an account within the highway fund which shall be allocated and expended for the purpose of constructing, rehabilitating, relocating or modifying railroad grade separation facilities.

WYOMING STATUTES
TITLE 39. TAXATION AND REVENUE
CHAPTER 21. EXCISE TAX ON COMMERCIAL TRANSPORTATION OF COAL

§ 39-21-101. Definitions

(a) As used in this chapter:

(i) "Department" means the department of revenue;

(ii) "Commercial transportation of coal" means the movement of coal using equipment

authorized for use on public roads or railroads by private, contract or common carriers.

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§ 39-21-102. Administration

The department of revenue shall enforce the provisions of this chapter. The department shall promulgate rules and regulations necessary for the implementation and enforcement of this chapter.

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§ 39-21-103. Imposition

There is levied an excise tax on each person commercially transporting coal in this state. The tax shall be applied to any person commercially transporting coal within the state of Wyoming.

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§ 39-21-104. Taxation rate

(a) The tax shall be levied at the rate of one-tenth of one mill (.0001) for each ton, or portion thereof, of coal commercially transported per mile, or portion thereof, in this state. The tax shall be imposed upon any coal produced in this state.

(b) In no event shall the tax upon any person commercially transporting coal in this state be less than fifty cents ($.50) per truck, trailer or railcar used to transport coal.

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§ 39-21-105. Exemptions

The tax imposed by this chapter shall not apply to any person transporting coal for his own personal use and not for commercial gain.

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§ 39-21-106. Licensing; permits

There are no specific applicable provisions for licensing and permits for this chapter.

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§ 39-21-107. Compliance; collection procedures

(a) Returns and reports. On or before May 1 of each year, each person commercially transporting coal in this state shall submit to the department of revenue, on forms prescribed by the department of revenue, a report of the total amount of tons of coal and total miles transported in this state during the previous calendar year.

(b) Payment. All taxes shall be due on the date of reporting and shall be delinquent if not paid on or before May 1. The department of revenue shall collect the tax due pursuant to this chapter from each person liable for the tax imposed by this chapter.

(c) Timelines. There are no specific applicable provisions for timelines for this chapter.

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§ 39-21-108. Enforcement

(a) Audits. There are no specific applicable provisions for audits for this chapter.

(b) Interest. Interest at an annual rate equal to the average prime interest rate as determined by the state treasurer during the preceding fiscal year plus four percent (4%) shall be added to all delinquent taxes under this chapter. To determine the average prime interest rate, the state treasurer shall average the prime interest rate for at least seventy-five percent (75%) of the thirty (30) largest banks in the United States. The interest rate on delinquent taxes shall be adjusted on January 1 of each year following the year in which taxes first became delinquent. In no instance shall the delinquent tax rate be less than twelve percent (12%) nor greater than eighteen percent (18%).

(c) Penalties. The following shall apply:

(i) If any person fails to make or file a return and remit the tax as required by this chapter the department shall impose a penalty of five percent (5%) of the taxes due for each thirty (30) day period, or fraction thereof, elapsing between the due date of the return and the date filed, unless the person for good cause obtains from the department an extension of time for filing prior to the due date for filing. In no event shall the total penalty imposed by this paragraph exceed twenty-five percent (25%) of the tax due. The department, for good cause, may waive a penalty imposed for failure to file a return as required by this section, provided that:

(A) The return was filed within five (5) business days following the due date,

including an approved extension period; and

(B) The taxpayer requests the waiver in writing within fifteen (15) days after the return was filed, setting forth the reasons for the late filing.

(ii) If any part of a tax deficiency is due to negligence or intentional disregard of rules and regulations there shall be added a penalty of five percent (5%) of the amount of the deficiency plus interest as provided by subsection (b) of this section. The taxes, penalty and interest shall be paid by the taxpayer within ten (10) days after receipt of notice and demand by the department;

(iii) Taxes due together with interest, penalties and costs shall be collectible by the department by appropriate judicial proceedings;

(iv) The department may credit or waive penalties imposed by this section as part of a settlement or for any other good cause.

(d) Liens. Any delinquent tax is a lien upon any property of any person owing the tax, from and after the time the tax is due until the tax is paid. The tax lien shall have preference over all liens except any valid mortgage or other liens of record filed or recorded prior to the date the tax became due.

(e) Tax sales. There are no specific applicable provisions for tax sales for this chapter.

§ 39-21-109. Taxpayer remedies

The tax imposed and paid pursuant to this chapter shall be a tax credit against sales taxes paid by the same person when that person is exempt from the fuel tax due under W.S. 39-17-104(a) or 39-17-204(a), but is not exempt from sales tax on that fuel.

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§ 39-21-110. Statute of limitations

There are no specific applicable provisions for a statute of limitations for this chapter.

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§ 39-21-111. Distribution

All net revenues derived from the tax imposed by this chapter shall be deposited into an escrow account until such time as the attorney general certifies to the governor and the legislature that no obligations remain attached to the tax collections. No expenditures shall be made from the escrow account except as authorized under this section. At the time of certification, all net revenues derived from the tax and all amounts within the escrow account shall be transferred to the permanent Wyoming mineral trust fund.
